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ABSTRACT

Problems related to instructional materials and copyright laws have not been resolved. The use of the products of advanced technology in the classroom--videotaped, photocopied materials, close-circuit television, and individual cassette programs--has multiplied, but Congress has failed to pass any new legislation. As educators and librarians have adopted new techniques for better instruction an age-old question takes on new urgency: what kinds of resources are teachers permitted to reproduce and duplicate for classroom use and what kinds of materials involve an infringement on the copyright privileges of others? This document discusses court cases in which the copyright laws affected classroom activities. The document also discusses the inconsistencies arising from the fair use doctrine. The fair use doctrine defines the necessary purpose, character, nature, amount, substantiality, and potential market effect of a work in order for it to be legally used for such purposes as criticism, comment, news reporting, teaching, research, and scholarship. (Author/KE)

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INSTRUCTIONAL MATERIALS AND COPYRIGHT DILEMMAS

"Don't Touch! This is Copyrighted!" was the title of a round-table discussion conducted by Educational Leadership in 1968 to discuss the implications of a proposed revision of the Copyright Act on instructional materials. The participants at the conference, while speculating on possible changes, noted an important dilemma faced by teachers and media personnel alike. Although new technological advances have made educational materials more available and accessible, and while administrators and school boards have increasingly urged teachers to adopt new types of materials for instructional purposes, there are a number of legal regulations which prohibit the use of innovative materials in the classroom. "This is unfortunate," remarked one participant, "because education in the 1970's needs a 'hand-on' policy not a 'hands-off.'"[1]

During the seven years following the symposium, the problems related to instructional materials and copyright law have not been resolved. For one thing, Congress has failed to pass any new copyright legislation.[2] For another, the use of the products of advanced technology in the classroom--videotapes, photocopied materials, close-circuit television, and individual cassette programs--has multiplied exponentially. As educators and librarians have adopted new techniques for better instruction, an age-old question takes on new urgency: what kinds of resources are teachers permitted to reproduce and duplicate for classroom use and what kinds of materials involve an infringement on the copyright privileges of others?

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I

Teachers normally do not envision that copyright laws affect their classroom activities. There are, however, two recent court cases that directly involve instructors and copyright questions. In Wihtol v. Crow,[3] Nelson E. Crow, head of the vocal department of a junior college-high school in Clarinda, Iowa, was sued for copyright infringement by Austris A. Wihtol. Crow, without permission from Wihtol, copied the latter's song, "My God and I," adding a completely new arrangement to the original song. Approximately forty-eight copies of this new arrangement were reproduced on the school duplicating machine. The new arrangement, moreover, was performed once by the high school choir of eighty-four voices at a regular school-chapel service and on another occasion at the First Methodist Church by a smaller group of students. Copies of the song contained the words "arranged by Nelson E. Crow," and the sheets made no reference to the original composer, Austris E. Wihtol.

Does a teacher have the right to copy materials for instructional purposes or as part of his assigned duties without infringing on the copyright privileges of others? Crow, according to written testimony, had no intent of infringing on Wihtol's rights. In fact, Crow seemed very naive about the limitations imposed by the Copyright Act. The court, however, found that the copying in this case did constitute infringement and "the fact that his copying was done without intent to infringe would be of no help to him..." as a defense for his actions.[4]

Is the decision in this case unfair to Mr. Crow? After all, Crow did not make a profit on the song.[5] On the other hand, what would happen to the market for the song "My God and I" if every teacher in every school throughout the country were permitted to make copies of the song for each

of his students? The composer surely must have a legitimate right to control his intellectual and artistic creations.

The second case involving a teacher is Williams v. Weisser.[6] Mr. Williams, an assistant professor of anthropology at UCLA, sued Weisser for publishing his lecture notes without his expressed permission. Weisser owned and operated a lecture service called "Class Notes," and he sold detailed outlines of various courses given at UCLA. As part of his operating procedure, Weisser hired students to take notes in selected courses. After receiving typed copies of the lecture notes, Weisser would reproduce the outlines and offer them for sale. The court decided this case on behalf of Williams. Oral notes, it was ruled, have a common law copyright that allows the author the right of first publication. An author who owns a common law copyright may determine whether he wants to publish his ideas and under what circumstances. In this instance, Williams did not want his ideas to circulate in written form beyond the classroom.

Although this case reveals several divergent notions about the rights protected by copyright regulations, it clearly demonstrates that ideas in an educational setting cannot be appropriated without running into conflict with the privileges reserved by law for the author. Even in the classroom, ideas are regarded as a form of intellectual property, and legal regulations exist to protect "expressions" coming into the classroom as well as going out.

Before examining what kinds of materials are limited to the sole use of the copyright owner, or his designated agent, it will be instructive to look at the provisions of the Copyright Act itself. At the outset, it is important to note that copyright laws--whether they concern duplicating a song, utilizing a teacher's notes for profit, or duplicating portions of a copyrighted book--involve the right to restrict the diffusion of

knowledge. Copyright registration grants a limited monopoly to producers of creative endeavors so that they may capitalize on the fruits of their efforts. When using a copyrighted work, "acknowledgment of the source, the absence of the intent to infringe, or the lack of knowledge that the work was copyrighted does not vitiate an encroachment on the owner's monopoly."[7]

The basis for copyright regulations is found in the Constitution, which empowers Congress "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."[8] The Copyright Act of 1909 protects literary, artistic, and creative products, including such diverse items as maps, directories, newspapers, motion pictures, sound recordings, plays, lectures, and books. A copyright grant remains in effect for twenty-eight years and can be renewed for an additional twenty-eight years. After fifty-six years, the work falls into the public domain. Infringement of a proprietor's copyright can invoke specific penalties ranging from $250 to $10,000 per infringement.

Whose rights is the Copyright Act designed to protect? In brief, the law protects the rights of the proprietor to exclusively print, reprint, publish, copy, and vend the copyrighted work.[9] If anyone copies the work and inappropriately uses it, he may be infringing on the proprietor's opportunity to vend by taking away his exclusive right to control the work. In Mr. Crow's case, the fact that Crow hurt the market for Wihtol's song reflected a possible economic harm to Wihtol and thus constituted infringement. Hurting the proprietor's opportunity to vend is an important consideration in copyright cases. Many of us who use photocopied reprints of textbooks are insufficiently aware that textbooks account for book sales

of $900 million[10] and that textbooks account for thirty-five percent--the single largest portion--of all publishing revenues.[11] It is not surprising, therefore, that publishers and authors have a strong economic incentive to protect the unauthorized appropriation of their works.

Over the years, however, the exclusive rights of copyright holders have been diluted by a series of judicial decisions which have attempted to weigh the author's need for compensation against the public's need for access to information. Although it lacks statutory authority, the "Doctrine of Fair Use" has developed through case law and judges have employed this judicially-created standard in rendering decisions. Under case law, Fair Use applies only to reproduction for such purposes as criticism, comment, news reporting, teaching, scholarship, and research. The doctrine, however, is not a blanket exemption for the aforementioned activities; it embraces four conditions, all of which must be met if duplicating or utilizing a product is to fall within the bounds of Fair Use.[12] Indeed, Fair Use applies--if and only if--the four factors taken as a whole have been satisfied:

A. The Purpose and Character of the Use. The materials must be used for such purposes as teaching, scholarship, and research and the use must be non-profit.[13] Fair Use would probably allow teachers acting on their own discretion to reproduce small portions of a work, but it excludes the copying and distribution of works by a school system or department.[14]

B. The Nature of the Copyrighted Work. Copying portions of a news article or documentary film would probably be Fair Use, but not copying from a workbook designed for use in a classroom. Duplicating pages of a communication-games book would probably be a difficult question.

As a rule, the courts have found that ideas per se are not copyrightable, but the expression of ideas can be protected.[15] Does a communication-games book contain general ideas on the communication process or unique expressions of behavioral goals? In addition, a crucial factor in discussing the nature of the work is whether or not the work is available commercially for use. If the work is out-of-print or cannot be easily purchased, the user may have more justification for reproducing it than under normal circumstances.[16]

C. The Amount and Substantiality of the Portion Used. Fair Use allows instructors to use limited portions of a work; it does not provide for copying the whole of a work. Although there is no ready-made formula, Fair Use gauges the portion copied with respect to the entire work. Under normal circumstances, copying a sentence, or a paragraph would be Fair Use and copying a large section of a chapter may be. At the same time, if a segment contains "the entire essence of a work," copying it will not be considered Fair Use even if the sequence only covers a small portion.[17]

D. The Effect of the Use on the Potential Market for or Value of the Work. When economic injury to the copyright holder can be demonstrated, even making a single copy--no matter how small the amount of money involved--may be an infringement. Among the four criteria, this market variable is usually given the greatest weight by the courts.[18]

II

New technological developments, however, have made the application of the Fair Use Doctrine--already laden with inconsistencies--even more difficult. The recent Supreme Court decision in Williams and Wilkins v.

the United States[19] applied the Fair Use standard to photocopied materials. The Court's opinion, a 4-4 tie on the use of photocopied materials, allowed the ruling of an appeals court to stand in favor of utilizing photocopies--although the voting deadlock gives the opinion only limited precedental value. For teachers, especially those for whom photocopies have become an institutional adjunct to regular textbook assignments, this case raises an important question: to what extent are teachers permitted to photocopy journals and articles for use in the classroom without infringing upon the privileges of the copyright holder? Does such activity constitute Fair Use or infringement? Predictably, there is no easy litmus test to measure protection in photocopying; the facts in the Williams and Wilkins case, however, provide some insight into the difficulties.

In Williams and Wilkins, the plantiff, a small publishing company dealing in medical journals, brought a copyright infringement suit against the United States government. Specifically, the plantiff alleged that the National Institute of Health and the National Library of Medicine had infringed upon the copyrights owned by Williams and Wilkins by making unauthorized photocopies of articles in four journals. In effect, the government had distributed photocopied materials, free-of-charge and on a no-return basis, to researchers associated with the two institutes. As a general rule, the libraries at these two institutes had enforced a self-imposed policy of limiting requests for materials to fifty pages and to a single copy of a journal article per person. The extent of the duplicated materials, however, reached massive proportions, estimated roughly at about 930,000 pages in 1970.[20]

Williams and Wilkins contended that photocopying, unlike handcopying, was a form of publishing rendered illegal under the Copyright Act, and that the extensive use of photocopies had resulted in a loss of revenue for

their company. The Court of Claims carefully avoided the question of whether photocopying was publishing, neo-publishing, or mechanical reproduction; it suggested that the question was a matter for Congress to decide. The court, nevertheless, held that since the Plantiff could not document precisely the extent of the alleged loss of revenue due to photocopying, a flat prohibition on photocopying in medicine, without countervailing factors, would be detrimental to scientific progress.

The dissenting opinions in this case, however, are equally noteworthy. Justice Cowens thought that the opinion of the majority failed to analyze the important changes in copying procedures due to new technology. "What we have before us," declared Cowens, "is a case of wholesale, machine copying, and distribution of copyrighted materials by defendant's libraries on a scale so vast that it dwarfs the output of many publishing companies."[21] Elsewhere in the opinion, Cowens questioned the belief that photocopying meets the criteria of Fair Use:

> The photocopies are exact duplicates of the original articles; and serve to diminish plantiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute the plantiff's market.[22]

Justice Nichols, joining Cowens and Kunzig in dissent, noted that Williams and Wilkins did not want to prohibit photocopying; the plantiff only wanted to license it to defray the publisher's cost and compensate the authors for their contributions. Nichols concluded his opinion on an emotional and apprehensive note: "We are making the Dred Scott decision in copyright law."[23]

The case-by-case approach used by the courts has neither remedied the confusion nor left teachers clear about the legality of photocopying for classroom purposes. It is highly likely that another case coming before the courts under slighly different circumstances will not be decided in the same manner. If a similar set of circumstances does occur, educators,

of course, could draw an analogy between the researchers in Williams and Wilkins and the teacher in a school setting: both groups appropriate the works of other writers for research and educational purposes; both groups operate on a non-profit basis; both groups would find it very inconvenient to wait until the necessary permission arrives from the copyright holder before using desired materials; and both medical research and education would suffer hardships if photocopying were not available.

Yet the essential problem facing teachers is that no clear-cut guidelines regarding what can and what cannot be copied for use in the classroom are evident. The Doctrine of Fair Use is a loosely calibrated equation that even trained lawyers have difficulty understanding. Equally ambiguous is the holding from Williams and Wilkins--limited number of copies, scholarly and research purposes, and a limited portion of the work--since the key terms of the decision are open to various interpretations. In effect, the best protection extended to teachers on copyright questions has been the publishers' unwillingness to involve themselves in litigation over minor matters.

If the reluctance of publishers to sue in the past has led educators to believe in the legality of copying, new technological advances have transformed copying and duplicating from a minor activity to a major industry. And the fears of the publishers seem justified. In 1969, the vice-chairman of the Xerox Corporation stated: "The U.S. produced 27.5 billion paper copies in 1967."[24] In 1975, Louise Weinberg estimated that "Xerox-type photocopying produces 50 billion pages annually,"[25] and it is reasonable to infer that many of the copies are made in connection with educational activities. In addition, during the past 10 years, the cost of copying a single page has declined so that it is possible to reduce the expense to less than a half-a-cent per page.[26] A similar line of

analysis applies to videotapes.[27] Publishers and authors are now becoming more vigilant about possible infringement of their copyrighted materials. Under the current law, teachers, most of whom were previously unconcerned about the copyright problems in using instructional materials, are at the whim and discretion of authors and publishers who may sue at any time.

A number of hypothetical situations may cast some additional light on the difficulties facing teachers who appropriate copyrighted materials for the classroom:

ITEM #1: A college professor, teaching in a film studies program, wants his students to make an experimental film based on Tom Tyron's latest book, Lady. The department supplies the cameras and the equipment.

ANALYSIS: Since the copyright holder owns the exclusive privilege to prepare any derivative works based on the novel, Tyron could easily deny permission to use the novel if he were asked. If the instructor uses the novel to make the film anyway, Tyron could sue, especially if the film circulates in the department.

ITEM #2: A university buys a copy of a 16mm film on the techniques of persuasion and makes 5 videotape cassette copies for individual use by the students.

ANALYSIS: Making any copies of the film is illegal and violates the Copyright Act. Copying in this instance is a form of videopiracy.

ITEM #3: A university pays a nationally-prominent figure $2,000 to deliver a speech on campus. The presentation is taped by an instructor who teaches a class in advanced argumentation for future use in the classroom.

ANALYSIS: Despite the lecture fee, the speaker, like Professor Williams in a previously discussed case, maintains a common law copyright in his speech. The likelihood of him wanting to make a recording of his campus speeches is not very high, but securing his permission would be a safe bet in the event that he does make a record of his campus speeches.

ITEM #4: A nationally-known lobby of housewives and teachers working in the area of children's television makes a movie which is basically a collection of color videotape commercials taken from television

without the consent of the sponsors. The lobby, a non-profit, tax-exempt organization, charges high schools, colleges, and universities $25 to show the film.

ANALYSIS: Although the lobby is a non-profit organization, charging a $25 fee makes the situation a clear-cut case of copyright violation. The film is composed of copyrighted materials that are owned by the creators of the commercials. In a related case, CBS sued Vanderbilt University for distributing videotape reproductions of the CBS Evening News. Senate Bill S 1361 contains an amendment proposed by Senator Howard Baker to permit the reproduction and distribution of audiovisual news programs; the amendment was passed by the Senate.[28]

ITEM #5: An instructor teaching a course entitled "Mass Media and Society" videotapes selected portions of various sports events for use in the classroom. Included among his selections is the Superbowl football game that CBS has presented. During the telecast, CBS announces that all rights to the game are reserved and that no portion of the show may be rebroadcasted or used for any purpose without the written consent of the network.

ANALYSIS: CBS is probably running a copyright bluff; scholars have the right to use portions of the program for comment and teaching under the Fair Use Doctrine. There are, however, no precedents at the current time for deciding videotape cases in the classroom one way or another. Writing for permission may eliminate unnecessary legal difficulties.

Many of these examples are borderline cases where the current statutes are unclear about the copyright obligations of teachers. With the increased availability of new technology and the growing concern by publishers wanting to protect copyrighted materials, teachers and librarians have lobbied for a blanket exemption from copyright infringement in educational settings. It would, of course, be in the interest of education to obtain a blanket waiver on all materials that are used in the classroom. At the same time, educators must realize that textbook publishing and educational films are major industries. Publishers have maintained that an open waiver to education would take away profits from authors and publishing companies and destroy the incentive to work. Each unauthorized copy of a work allegedly takes away from the profits of both authors and publishers.

There are no clear-cut answers; a flat waiver, however, seems unlikely.[29] Above all, the technological revolution in copying procedures has created a seamless web of problems for the teacher with respect to copyright regulations--especially the teacher who attempts to use innovative materials. "There seems to be a high correlation between creative teaching practice and potential infringement of the law," noted Dr. Harold Wigren almost a decade ago,[30] and no legislation has remedied that difficulty despite the repeated efforts by Congress to draft a new copyright law. Unless a revision of the copyright law is enacted, creative teaching practices and the use of modern instructional materials will increasingly collide with the rights of authors and producers. And the ultimate loser in this conflict will inevitably be the students. A workable solution is needed that allows teachers non-usurious access to instructional materials without undermining the legitimate rights of the creators. In any event, it is unlikely that we have heard the last word on the controversy.

NOTES ON SOURCE MATERIALS

[1]Harold W. Wigren, "Don't Touch! This is Copyrighted!" Educational Leadership 26(December, 1968), p. 254.

[2]"Copyright," Congressional Quarterly Weekly Report, 14 September 1974, p. 4731. Although the Senate by a vote of 71-1 passed a new copyright bill, S 1361, no action was taken in the House of Representatives on a bill. Several pages in the Senate bill are devoted to the application of copyright regulations to copying by teachers and librarians.

[3]Wihtol v. Crow, 309 F. 2d 777(8th cir., 1962).

[4]Ibid., p. 780.

[5]Barbara A. Ringer, "Old Copyright Law--Present Status and Proposals for Change," in Copyright--the Librarian and the Law, ed. George J. Lukac (New Brunswick, N.J.: Rutgers University Graduate School of Library Service, 1972), p. 17.

[6]Williams V. Weisser, 78 Cal. Rep. 542 (1969).

[7]Nancy Shuster and Marc J. Bloch, "Mechanical Copying, Copyright Law, and the Teacher," Cleveland-Marshall Law Review 17(May, 1968), p. 301.

[8]U.S. Constitution, Article I, sec. 8, clause 8.

[9]17 U.S.C.A., Section I.

[10]Ray Eldon Hiebert, Donald F. Ungurait, and Thomas W. Bohn, Mass Media: An Introduction to Modern Communication (New York: David McKay Company, Inc., 1974), p. 194.

[11]Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs," Harvard Law Review 84(1970), pp. 292-293.

[12]Melville B. Nimmer, Cases and Materials on Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Work (St. Paul: West Publishing Company, 1971), p. 369. See, also, Harris Maslansky, "Copyright: What Copying is Right?" The Science Teacher, 4(May, 1973), p. 50 and Ivan Bender and David Engler, "When Is It Legal to Duplicate," Media and Methods 11(January, 1975), pp. 42-47.

[13]Ann W. MacLean, "Education and Copyright: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System," Virginia Law Review 56(May, 1970), p. 666.

[14]Ibid., p. 670.

[15]Melville B. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Fress Speech and Press?" UCLA Law Review 17(1970), pp. 1189-1193.

[16]William H. Carnahan, "The Copyright Dilemma in the Classroom: But Can it be Done?" Air University Review 23(Jan.-Feb., 1972), p. 46.

[17]Quoted in Carol Schmidt, "Copyright: Living with a 1909 Law," Educational Broadcasting, 8(January-February, 1975), p. 20.

[18]Nicholas H. Henry, "Copyright, Public Policy and Information Technology," Science 183(1974), p. 384.

[19]Williams and Wilkins v. U.S., 95 S.Ct. 1344 (1975).

[20]Williams and Wilkins v. U.S., 487 F. 2d 1345 (1973).

[21]Ibid., p. 1364.

[22]Ibid., p. 1378 .

[23]Ibid., p. 1387.

[24]Quoted in Louise Weinberg, "The Photocopying Revolution and the Copyright Crisis," Public Interest 38(Winter, 1975), p. 118.

[25]Weinberg, p. 118.

[26]Henry, p. 388. Henry also cites some interesting data on photocopying in higher education as opposed to copying in elementary and secondary schools. He points out that "copying of published materials is considerably greater in colleges than in schools which tend to photocopy administrative papers. When published works are copied in schools, textbooks are favored, followed by music scores, and answer sheets. College personnel tend to photocopy journals, monographs and reference books, in that order of frequency." (p. 388.)

[27]Roundtable Discussion, "Video Piracy--A Now Problem," in the Videoplay section Educational and Industrial Television 4(October, 1972), pp. 2-10.

[28]"Copyright," Congressional Quarterly Weekly Report, 14 September 1974, p. 4731.

[29]U.S. Congress, Senate, Senator McCellan speaking for S 1361, 93d Congress, 2nd Sess., September 6, 1974, Congressional Record, p. 16069.

[30]U.S. Congress, Senate, Harold E. Wigren speaking for S. Res. 48 on S. 1006, Patents, Trademarks and Copyrights Hearings, before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 89th Congress, 1st Sess., 1965, p. 89.